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In the Supreme Court of the United States

OCTOBER TERM, 1983

MARVIN JAMES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Tenth Circuit, and the United States District Court for the Western District of Oklahoma, erroneously expanded or ignored this Court's prior holdings requiring that a mailing be sufficiently closely related to an alleged scheme to defraud pursuant to Title 18 U.S.C. Section 1341.

2. Whether the holdings of the Tenth Circuit Court of Appeals that the evidence was sufficient to give an instruction on the Depletion of Assets Theory of Interstate Commerce is in conflict with decisions of the Second and Seventh Circuit Courts of Appeal on the same issue.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE	2
STATEMENT OF THE CASE	5
A. Procedural Background of the Case	5
B. Relevant Facts Material to a Consideration of Questions Presented	7
REASONS FOR GRANTING THE WRIT:	
I. The finding of the trial court and Court of Appeals that the mailings in Petitioner's case were an integral part of a scheme to defraud is in direct conflict with this Court's decisions	9
II. The holding of the Tenth Circuit Court of Appeals that the evidence was sufficient to give an instruction on the depletion of assets theory of interstate commerce is in conflict with decisions of the Second and Seventh Circuit Courts of Appeals on the same issue	21
CONCLUSION	23
CERTIFICATE OF SERVICE follows Petition	
APPENDIX A — Opinion of the United States Court of Appeals for the Tenth Circuit	
APPENDIX B — Petition for Rehearing of Appellant, Marvin James	
APPENDIX C — Order Denying Petition for Rehearing	

TABLE OF AUTHORITIES

Cases PAGE(S)

Kann v. *United States*,
323 U.S. 81 (1944) 12

Parr v. *United States*,
363 U.S. 370 (1960) 12, 14

Pereira v. *United States*,
347 U.S. 1 (1954) 12-13

United States v. *Bottom*,
638 F.2d 781 (5th Cir. 1981) 18-19

United States v. *Elders*,
569 F.2d 1020 (7th Cir. 1978) 22

United States v. *Lynn*,
461 F.2d 759 ..... 17, 18

United States v. *Maze*,
44 U.S. 395 (1974) 12-13, 15-16, 17, 18, 19

United States v. *Merolla*,
523 F.2d 51 (2d Cir. 1975) 22, 23

United States Code

18 U.S.C. § 1341 ..... 2, 5, 12, 23
18 U.S.C. § 1951 ..... 2, 5
28 U.S.C. § 1254(1) 2

Statutes

19 O.S. § 339 ..... 3-4, 14
19 O.S. § 347 ..... 2-3, 14

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Marvin James, requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on September 30, 1983.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit was published and appears at ..... F.2d ..... (1984), and appears in Appendix A of this Petition. No opinions were rendered by the trial court.

JURISDICTION

The Petitioner is seeking a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit in order to review a judgment entered on February 29, 1984. A timely Petition for Rehearing was denied by the United

States Court of Appeals for the Tenth Circuit on March 26, 1984. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

1. Title 18 U.S.C. § 1341 provides, in pertinent portion:

   "Whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the postal service . . . or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five (5) years, or both."

2. Title 18 U.S.C. § 1951 provides, in pertinent portion:

   (a) "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce by robbery or extortion . . . shall be fined not more than $10,000.00 or imprisoned not more than twenty (20) years, or both.

   (b) "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

3. 19 O.S. § 347 provides, in pertinent portion:

   ". . . All warrants upon the County Treasurer for a County purpose shall be issued upon the order of the Board of County Commissioners, drawn by the County Clerk, signed by the Chairman of the Board, and attested by the signature of the County Clerk, with the

County Seal attached. Each warrant shall designate the fund, department and appropriation account, and shall further show the nature of the indebtedness acknowledged by the allowance of the claim so paid. . ."

4. Title 19 § 339 Oklahoma Statutes, further states:

"They shall have power:

1. To make all orders respecting the real property of the county, to sell the public grounds of the county and to purchase other grounds in lieu thereof; and for the purpose of carrying out the provisions of this section it shall be sufficient to convey all the interests of the county in such grounds when an order made for the sale and a deed is executed in the name of the county by the chairman of the board of county commissioners, reciting the order, and signed and acknowledged by him for and on behalf of the county.

2. To audit the accounts of all officers having the care, management, collection or disbursement of any money belonging to the county or appropriated for its benefit.

3. To construct and repair bridges and to open, lay out and vacate highways: Provided, however, that when any state institution, school or department shall own, lease or otherwise control land on both sides of any established highway, the governing board or body of the same shall have the power to vacate alter or relocate said highway adjoining said property in the following manner:

If it should appear that it would be to the best use and interest of such institution, school or department to vacate, alter or relocate such highway, the governing board or body shall notify the board of county commissioners, in writing, of their intention to hold a public hearing and determine whether to vacate, alter or relocate such highway, setting forth the location and terminals of said road, and all data con-

cerning the proposed right-of-way if changed or relocated, and shall give fifteen (15) days notice of such hearing by publication in some newspaper in the county or counties in which the road is located, and such hearing shall be held at the county seat of the county in which the road is located, and if a county line road, may be heard in either county. At such hearing testimony may be taken, and any protests or suggestions shall be received as to the proposed measure, and at the conclusion thereof if the governing board or body shall find that it would be to the best use and interest of such institution, school or department, and the public generally, they may make an appropriate order either vacating, altering or relocating said highway, which order shall be final; provided further, that such institution, school or department may by agreement share the cost of changing any such road; and provided further that no property owner shall be denied access to a public highway by such order.

4. Until January 1, 1983, to furnish necessary blank books, plats, blanks and stationery for the clerk of the district court, county clerk, register of deeds, county treasurer and county judge, sheriff, county superintendent of schools, county surveyor and county attorney, justices of the peace, and constables, to be paid for out of the county treasury; also a fire-proof vault sufficient in which to keep all the books, records, vouchers and papers pertaining to the business of the county.

5. To set off, organize and change the boundaries of townships and to designate and give names therefor: Provided, that the boundaries of no township shall be changed within six (6) months next preceding a general election.

6. To do and perform such other duties and acts that the board of county commissioners may be required by law to do and perform."

STATEMENT OF THE CASE

A. *Procedural Background of the Case*

The Petitioner herein, Marvin James, was initially indicted by a Federal Grand Jury in the Eastern District of Oklahoma. The Petitioner was charged with thirty-eight counts of having devised and intending to devise a scheme to defraud the citizens of McIntosh County, State of Oklahoma, and using the mails in furtherance of this fraud, in violation of Title 18, U.S.C. Sec. 1341.

The Petitioner was also charged with attempting to obstruct, delay or affect commerce and in the movement of articles and commodities in commerce as defined in Title 18, U.S.C. Sec. 1951 by extortion, in that Petitioner allegedly unlawfully obtained under color of official right, money from vendors of road and bridge building and maintenance materials and supplies, which money was not due the Petitioner or his office, and which money Petitioner was not entitled to.

The Jury returned a verdict of guilty on Counts 14 through 36, all of which were mail fraud counts and guilty on Counts 40, 41 and 43, all of which were extortion counts. The Jury returned the verdict of not guilty on Counts 1 through 13, Counts 37 through 39, all of which were mail fraud counts, and not guilty on Count 42, which was an extortion count.

The Honorable Frank H. Seay, United States District Judge, sentenced the Petitioner to the custody of the Attorney General on all counts for a period of six months, the sentence on each count to run consecutively with all other counts, and fined the Petitioner $1,000.00 on each

count, for a total sentence of thirteen years imprisonment and a fine of $26,000.00.

Petitioner perfected an appeal to the United States Court of Appeals for the Tenth Circuit. The Petitioner argued that the routine mailing of county warrants could not be for the purpose of executing the scheme to defraud as alleged. Also, Petitioner argued that the evidence was wholly insufficient to satisfy the government's burden of proof with respect to establishing a nexus with interstate commerce.

The United States Court of Appeals for the Tenth Circuit affirmed the Petitioner's conviction on all of the Mail Fraud Counts and all of the Extortion Counts. A copy of the Opinion of the United States Court of Appeals for the Tenth Circuits is attached hereto as Appendix A.

The Petitioner herein timely petitioned the United States Court of Appeals for the Tenth Circuit for a rehearing in his case. A copy of Petitioner's Petition for Rehearing in the United States Court of Appeals for the Tenth Circuit is attached hereto as Appendix B. The United States Court of Appeals for the Tenth Circuit denied the Petitioner's Petition for Rehearing and a copy of said denial is attached hereto as Appendix C.

B. ***Relevant Facts Material to a Consideration of Questions Presented***

Petitioner's indictment was the result of a statewide, ongoing Federal investigation into alleged corrupt practices by County Commissioners in the State of Oklahoma. The indictment charged Petitioner with accepting cash kickbacks from vendors or sellers of road and bridge building equipment and supplies. Federal jurisdiction was premised on the theory that the mailing of the warrants or checks as payment for the equipment and supplies was in furtherance of the scheme to defraud.

During the period set forth in the Indictment, the Petitioner was a County Commission for McIntosh County, State of Oklahoma. The 38 Counts of mail fraud were based upon allegations that the Petitioner herein devised and intended to devise a scheme to defraud the citizens of McIntosh County out of their right to have the business of McIntosh County conducted openly, honestly, impartially, free from corruption and undue influence and in accordance with the official oath of office by their elected County Commissioner, and to use the United States Mails in furtherance of the scheme.

The Indictment alleged, and the proof at trial showed, that the alleged use of the mails in furtherance of the alleged scheme was payment of county warrants or checks, to the suppliers whom the Petitioner did business with while he was County Commissioner. The source of the alleged kickback money was never alleged, nor proven, to bear any relationship to the price of materials or supplies purchased by the Petitioner, or to the mailing of the county warrants.

Indeed, the Government's allegations as set forth in the Indictment, relative to the mailings, was as follows: The Petitioner would place orders and arrange for the purchase of equipment and parts, and road and bridge building and maintenance materials and supplies for McIntosh County from various vendors. It was a further part of the alleged scheme that the Petitioner would receive from these vendors cash kickbacks. In furtherance of the alleged scheme to defraud, the Petitioner supposedly caused to be placed in the mail, county warrants from McIntosh County, to the particular vendors as payment for supplies, materials and equipment that were delivered.

The Petitioner moved for a judgment of acquittal at the close of the Government's case in the trial court, claiming that the evidence had failed to show that the mailings were an integral part of any scheme. The Motion was overruled, and was subsequently renewed at the close of all the evidence, and was again overruled. This argument was submitted to the United States Court of Appeals for the Tenth Circuit, which also rejected the argument. The Petitioner argued in the trial court, and on Appeal, that under this Court's decision in *United States* v. *Maze*, 414 U.S. 395 (1974), the allegations as contained in the indictment, and proof adduced at trial, clearly show that the mailings involved in Petitioner's case were not an integral part of any scheme to defraud the citizens of McIntosh County, State of Oklahoma.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Tenth Circuit, in affirming the trial court, has sanctioned a departure of the trial court from the accepted and usual course of judicial proceedings in that both the trial court and the Court of Appeals seemingly ignored this Court's applicable decisions.

I. THE FINDINGS OF THE TRIAL COURT AND THE COURT OF APPEALS THAT THE MAILINGS IN PETITIONER'S CASE WERE AN INTEGRAL PART OF A SCHEME TO DEFRAUD IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS.

As stated above, the Petitioner herein was charged with devising a scheme to defraud the citizens of McIntosh County, State of Oklahoma, by depriving them of their right to have their county business conducted openly, honestly, impartially and free from corruption and undue influence by their elected County Commissioner. It was further alleged that the Petitioner used the United States Mail in furtherance of the scheme. Count 1 of the Indictment, which is essentially identical to the remaining counts, is in substance as follows:

COUNT I

> "At all times material to this indictment Marvin James in the performance of his official duties as County Commissioner would place orders and arrange the purchase of material and supplies from various vendors doing business with McIntosh County, thereby causing the County Clerk's office of that county to encumber funds and send through the U.S. Mails county warrants or checks in payment for the material and supplies purchased.

At all times material to this indictment Marvin James was under a duty to the citizens of McIntosh County to perform the functions of his office openly, honestly, impartially, free from corruption and undue influence, without receiving directly or indirectly any money or other valuable things for the performance or nonperformance of any act or duty pertaining to this office other than the compensation allowed by law.

During the period commencing on or about January 8, 1973 and continuing thereafter to on or about December 14, 1981, Marvin James, the Defendant herein while serving as County Commissioner of McIntosh County devised and intended to devise a scheme to defraud the citizens of McIntosh County out of their right to have the business of McIntosh County conducted openly, honestly, impartially, free from corruption and undue influence and in accordance with the official oath of office by their elected county commissioner and to use the U.S. Mails in furtherance of the scheme.

As part of this scheme to defraud the citizens of McIntosh County, Marvin James in his official capacity as the County Commissioner of McIntosh County did place orders and arrange the purchase of equipment, equipment parts and service, road and bridge building and maintenance materials and supplies for McIntosh County from various vendors and in particular, Richard Henry Peak, doing business as Muskogee Equipment & Supply Company, Inc., Muskogee, Oklahoma; Bill Klutts, doing business as Okie Equipment Company, Meeker, Oklahoma; Marshall Greeman, doing business as Eastern Equipment Company, Muskogee, Oklahoma; Donald Skipworth, doing business as Cattle Material & Equipment Company, Oklahoma City, Oklahoma; Joe Swank, doing business as Port City Road Supplies, Muskogee, Oklahoma; and Ed Wilson doing business as Wilson Material Company, Oklahoma City, Oklahoma. It was a further part of the scheme that the defendant

did receive from these sellers of road and bridge building and maintenance supplies, cash kickbacks.

That on or about October 11, 1977, in the Eastern District of Oklahoma, Marvin James the Defendant herein for the purpose of executing the aforesaid scheme to defraud the citizens of McIntosh County and attempting to do so, did cause to be placed in an authorized mail depository to be sent and delivered by the U.S. Postal Service from McIntosh County to Okie Equipment Company, Meeker, Oklahoma an envelope containing county warrant #94 in the amount of $1,516.20 all in violation of Title 18, United States Code, Sections 1341 and 2."

As stated in the Indictment, it is alleged that the Petitioner caused the County Clerk's office to encumber funds. Thereafter, the office of the County Clerk would send county warrants for payment of the delivered supplies. These county warrants would be mailed to the supplier, when a sales transaction was consumated, or would be sent to a bank, in the event of a lease-purchase arrangement.

The evidence presented by the Government showed that the Petitioner was a County Commissioner from McIntosh County, State of Oklahoma, at all times material to the Indictment. The evidence further showed that the Petitioner, as County Commissioner, placed orders and arranged for the purchase of materials and supplies from Henry Peak, Bill Klutts, Marshall Greeman, Donald Skipworth, Joe Swank and Ed Wilson. Each of the government witnesses was heavily involved in the selling of road and bridge building and maintenance materials and supplies to County Commissioners in the State of Oklahoma.

They each testified that they paid the Petitioner a kickback on each purchase that he made from them. The amount of the kickback varied, but was generally ten percent of the purchase price. The kickbacks were always paid in cash but the government's evidence completely failed to show from what source the alleged kickbacks were paid, except possibly from the witnesses own funds. The evidence failed to show that the funds for kickbacks were somehow related to payment by the county to the various vendors. Therefore, the mailing of the county warrants simply were not shown to have been the funds for the payment of the kickbacks, or in furtherance of any scheme to defraud.

As this Court is well aware, the Federal Mail Fraud Statute, Title 18, U.S.C. Sec. 1341, does not purport to reach all frauds, but only those limited instances in which use of the mails is an integral part of the execution of the fraud, leaving all other cases to be dealt with by the appropriate state law. *Kann* v. *United States,* 323 U.S. 83, 56 S.Ct. 148, 89 L.Ed. 88 (1944); *Parr* v. *United States,* 363 U.S. 370, 80 S.Ct. 1170 (1960).

The Petitioner would submit that the dispositive issue in this case is simply whether the mailings were sufficiently closely related to the alleged scheme, as opposed to whether the mails were used remotely in relation to the alleged scheme. As this Court stated in *United States* v. *Maze,* 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974):

> "(1) In *Pereira* v. *United States,* 347 U.S. 1, 8-9, 74 S.Ct. 358, 363, 98 L.Ed. 435 (1954), the Court held that one 'causes' the mails to be used where he 'does an act with knowledge that the use of the mails will follow

> in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended . . .' We assume, as did the Court of Appeals, that the evidence would support a finding by the jury that *Maze* 'caused' the mailings of the invoices he signed from the out-of-state motels to the Louisville bank. But the more difficult question is whether these mailings were sufficiently closely related to respondent's scheme to bring his conduct within the statute." (At page 648).

It would appear, therefore, that the Government must contend that the mailings of the warrants were an integral part of the scheme. It is clear, however, that the alleged scheme was not contingent upon the mailing. As related in the Indictment, the purported scheme devised by the Petitioner was to deprive the citizens of McIntosh County of their right to have county business conducted openly, honestly, impartially, and free from corruption and undue influence by their elected County Commissioner, and the use of the United States Mails in furtherance of the scheme. In other words, to fall under the Federal Mail Fraud Statute, the mailing of the County Warrants must have been an integral part of the scheme to defraud, with the mailing sufficiently closely related to the purported scheme.

The Petitioner would submit that it was immaterial to the scheme as alleged and proven, whether any County Warrants were ever actually mailed. As stated hereinabove, the Government wholly failed to show that County Warrants were the source of any money for kickbacks. It was not alleged by the Government that the goods sold in each Count of the indictment were either overpriced, or not delivered. It would appear clear that the failure of proof

logically relates to the nebulous scheme alleged in the indictment. Obviously, if the Government had any proof that the Warrants were in fact the source of the kickbacks, the scheme would have alleged that the Petitioner paid kickbacks, and was able to pay kickbacks, because of the mailings of padded, or bogus County Warrants. Not one Count of the indictment does so.

Petitioner would also submit that once the goods were delivered to the County, that the mailing of the Warrants were, in effect, compelled by State law. As such, this case, and the other County Commissioner cases, are strikingly similar to *Parr* v. *United States*, 363 U.S. 370, 80 S.Ct. 1170 (1960.) In any event, as hereinabove mentioned, the fruition and execution of the purported scheme to defraud was not shown to depend on any mailings of County Warrants.

The Petitioner would submit that the circumstances in the instant case are similar to the *Parr* case in the following respects. Oklahoma State law compels County Commissioners to purchase materials, supplies and equipment to maintain and build their roads and bridges. Title 19 O.S. Section 339. State law further requires payment for the county obligations to be made by County Warrant. Title 19 O.S. Section 347. Since the county is compelled to issue Warrants for payment of its obligations, the County Clerk is compelled to use the mails to perform his or her legal duties. All purchases made by the county for county purposes are paid for by County Warrants. Under Oklahoma law, there is simply no other way a county in the State of Oklahoma can pay its bills. Therefore, the mailings of County Warrants, for payment of county obligations, cannot be said to be unlawful and a plot incident to an essen-

tial part of a scheme within the Mail Fraud Statute, even assuming a kickback is allegedly paid after the Warrant is cashed. The mailings are made, not for purpose of executing a scheme to defraud, but for the purpose of paying the counties' bills.

Admittedly, if the Government had alleged and proven that Petitioner's sales to the various counties relative to the indictment were based upon non-existent equipment, whereby the county received no supplies or materials, then it could be argued that the mailings of the County Warrants would clearly be unlawful under the Mail Fraud Statute.

In relation to the Counts of the indictment relating to equipment sales through lease-purchase agreements, Counts 36 through 39 of the indictment, the alleged scheme was even more unrelated to the mailing of the Warrants. In those Counts, the Warrants were mailed to the bank for payment of the equipment, subsequent to receipt by the vendor of the proceeds from the sale. Assuming arguendo, the existence of a scheme, the Petitioner would not care whether County Warrants were ever mailed to the banks.

In the *Maze* case, this Court determined that the "mailing" must be for the purpose of executing the scheme in a criminal case brought under the Mail Fraud Statute. In *Maze,* the defendant obtained a credit card belonging to another, and obtained food and lodging at motels in California, Florida and Louisiana. Each of these businesses sent to the Citizens Fidelity Bank & Trust Company in Louisville, which had issued the card, invoices representing goods and services furnished to the defendant. The defendant was

convicted under the Mail Fraud Statute; however, the Court of Appeals reversed the verdict and this Court affirmed the decision determining that the mailing by the establishments to the bank did not constitute a mailing for the purpose of executing the scheme. In that case, the Government contended that the delay in mailing the invoices to the bank allowed for additional use of the card without detection. In affirming the Circuit Court's decision, this Court stated:

> "We do not believe that *Sampson* sustains the Government's position. The subsequent mailings there were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendant less likely than if no mailing from the motel owners here to the Louisville bank increased the probability that respondent would be detected and apprehended. There was undoubtedly delay in transmitting invoices to the Louisville bank, as there is in the physical transmission of any business correspondence between cities separated by large distances. Mail service as a means of transmitting such correspondence from one city to another is designed to overcome the effect of the distance which separates the places. But it is the distance, and not the mail service, which causes the time lag in the physical transmission of such correspondence . . . Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this; instead, it required that the use of the mails be 'for the purpose of executing such scheme or artifice . . .' Since the mailings in this case were not for that purpose, the judgment of the Court of Appeals is affirmed."

The *Maze* case was preceded by a similar credit card case determined by the United States Court of Appeals for

the Tenth Circuit. In *United States* v. *Lynn*, 461 F.2d 759 (10th Cir. 1972), the defendants obtained a credit card, owned by another party, and charged purchases in the State of Wyoming. Subsequent thereto, invoices were mailed from the establishments where goods and services were obtained to the issuing bank for payment. As in and prior to *Maze*, supra, the United States Court of Appeals for the Tenth Circuit reversed the defendant's conviction on the mail fraud count determining that the mails were not used for execution of the scheme. There, the court stated:

> "The gist of the offense of mail fraud lies in the use of the mails to obtain money or property by fraudulent means. Utilization of the mails after the scheme has been fully consummated and completed in all of its parts cannot supply the essential ingredients for this offense. An examination of Tenth Circuit decisions affirming convictions of violation cases consciously availed themselves of the use of the mails in completion of their scheme. We view the transaction in Little America and Cheyenne, Wyoming, by use of the Ros credit card, as completed when the goods were received in exchange for the credit card sales drafts. It is immaterial what method the retail establishments chose to collect from BankAmericard. Use of the mails was not an essential element of this scheme. The Federal Mail Fraud Statute does not purport to reach all frauds, but only those instances in which the use of the mails is a part of the execution of the fraudulent scheme. All other cases are to be dealt with by appropriate state law."

It should be noted that, in both cases, the court determined that the scheme had been completed; however, that fact alone is not determinative as other cases have held mailing may be an integral part of the scheme even

though subsequent to fruition of the scheme. The usual premise of alleging that the scheme was completed, prior to the mailings, arises solely from the inference that a mailing could not be "integral" if the scheme was already completed.

The Government, and the Court of Appeals, relied on the case of *United States* v. *Bottom*, 638 F.2d 781 (5th Cir. 1981), a Fifth Circuit case to distinguish the case at bar from *Maze*, supra, and *Lynn*, supra. In *Bottom*, the defendants were convicted subsequent to an alleged scheme whereby, they as County Commissioners, participated in receiving money from "padded" and "bogus" invoices. In that scheme, pipe was sold by a vendor, Baldwin, to the county in instances where less pipe was delivered than exhibited on delivery tickets and where no pipe was delivered. In each of these instances, the County Commissioner was paid, in cash, for one-half of the profits from such sales. The County Commissioners were paid prior to receipt of checks from the county for the purchases and the defendants alleged that the scheme was completed prior to the mailing of checks to Baldwin for the sales. Unfortunately for the defendants, one act remained for completion of the scheme. The county paid on the 10th of the month and subsequent to these payments, the County Commissioners initialed the checks when returned from the bank to finally approve the sale and payment. The court rejected the arguments of the defendants and their reliance on *Maze*, supra, by distinguishing the circumstances. The court went on to hold:

> "The fraudulent scheme in the instant case employed mailings which were integral to the execution of the fraudulent plans and which were not made after the

> fruition of the fraud but were necessary to complete the scheme. The scheme was not complete when Baldwin paid the defendants 'up-front' the bogus or padded amounts in the invoices because Baldwin still needed the assistance of the defendants, who were the only ones who knew about the fraud and who had control of all the paperwork in their districts, to initial copies of the checks which reflected payment of the phony invoice attached to it. Furthermore, the county was not defrauded by the commissioners, the money released and the checks mailed to Baldwin. From the beginning of the scheme the defendant commissioners, who knew that the invoices were bogus or padded, were also aware that Baldwin would be paid by a check mailed to him by the county. Therefore, in this case, the mailing of the checks was an essential step integral to the completion or fruition of the scheme."

At first blush, it appears that the *Bottom* case is more closely akin to the case at bar than *Maze*, supra. However, it must be remembered that, in the case at bar, the various banks were the recipients of the County Warrants, and not the vendors witnesses. Again, in the case at bar neither Petitioner nor the vendors would care if the bank was ever paid the monthly installments; as the receipt of their fruits of the alleged scheme did not depend on or relate to the payments to the bank. It is also clear that the invoices in the *Bottom* case were padded or bogus.

Petitioner would submit that the trial court and the Circuit Court misconstrued or ignored the *Maze*, *Parr*, and *Kann* cases, not because the scheme was completed prior to the mailing, but simply because the mailing of the monthly lease-purchase payment was totally unrelated and not an integral part of the alleged scheme.

Although this theory is more easily realized in lease-purchase situations, the same theory applies in relation to the sales of materials to the Petitioner. The mailings of the County Warrants to the vendor witnesses were unnecessary for completion of the alleged scheme as the Government's evidence does not indicate any county funds were the source of Petitioner's alleged kickbacks. Obviously, the mailings of these Warrants were remotely related to the transactions. However, such use of the mails was not an integral part of the scheme and played no role in its completion.

Although the circumstances pertaining to some counts of the indictment in which sales of materials were made are different in that the Petitioner was paid the alleged kickbacks subsequent to the mailings, this fact alone does not result in a reasonable determination that they were a step toward completion of the scheme. Under the Government's evidence, the scheme would reach fruition even though Warrants were never mailed to the vendors.

II. THE HOLDING OF THE TENTH CIRCUIT COURT OF APPEALS THAT THE EVIDENCE WAS SUFFICIENT TO GIVE AN INSTRUCTION ON THE DEPLETION OF ASSETS THEORY OF INTERSTATE COMMERCE IS IN CONFLICT WITH DECISIONS OF THE SECOND AND SEVENTH CIRCUIT COURTS OF APPEAL ON THE SAME MATTER.

The Appellant was convicted of three (3) counts of extortion relating to the transactions and business actions he conducted with the witnesses Skipworth, Peak and Swank. The trial court instructed the jury that the Government's burden of proof as to affecting commerce would be satisfied if any supplies, materials or equipment purchased or obtained from outside the State of Oklahoma was brought into Oklahoma as a result of an extortionate transaction as charged (T.T., p. 904). The trial court further instructed the jury that if McIntosh County, Oklahoma, engaged in interstate commerce, and Petitioner's extortionate transactions were proven to deplete the assets of McIntosh County, Oklahoma, that such would be sufficient to satisfy the commerce requirement (T.T., pp. 904, 905).

There was absolutely no evidence that McIntosh County, Oklahoma purchased items or engaged in interstate commerce. The only evidence with respect to interstate commerce came from the witnesses Skipworth, Swank and Peak. As noted earlier, Skipworth initially testified that he didn't buy any materials from out of state, but when he was asked if any of the items he bought came from out of state, he responded that he was sure some of it did (T.T., p. 361). When the witness Swank was asked if he knew if any of the materials he purchased came from outside the State of Oklahoma, he responded possibly so, and

that he bought his materials from a company in Oklahoma City that probably bought their material out of state (T.T., p. 439). When the witness Peak was asked if any of his products he sold came from out of state, he responded that grader blades and plow bolts did (T.T., p. 495). Under the depletion of assets theory, where the victim of an extortionate scheme *customarily* obtains supplies through interstate commerce, the diminution of the victim's resources impairs his purchasing power, and therefore, affects interstate commerce for the purposes of the Hobbs Act. *United States* v. *Merolla,* 523 F.2d 51 (2d Cir. 1975); *United States* v. *Elders,* 569 F.2d 1020 (7th Cir. 1978). The victim's purchase of interstate goods, however, must be of a continuing nature, or the relationship between the extortion and any interstate commerce becomes merely conjecture. 523 F.2d at 45.

As noted earlier, there was no direct evidence that McIntosh County, Oklahoma, engaged in interstate commerce. The only evidence with respect to interstate commerce on the three (3) counts on which the Petitioner was convicted has already been cited. This evidence would certainly not be sufficient to satisfy the burden of proof that one customarily obtains supplies through interstate commerce before the diminution of their resources could be an effect on interstate commerce as required by the Second and Seventh Circuits. The Tenth Circuit's holding seems to indicate that if a victim of an extortionate scheme obtains *any* supplies through interstate commerce, then the diminution of that victim's resources could be an effect on interstate commerce for the purposes of the Hobbs Act. Petitioner contends that this type of interference does not

even amount to a de minimus effect on interstate commerce as the Hobbs Act requires. *United States* v. *Merolla,* supra. There seems to be a conflict among the Circuits as to whether a victim of an alleged extortionate scheme must customarily engage in commerce or must simply do any business in interstate commerce before the diminution of his resources will be held to be an effect on interstate commerce for purposes of the Hobbs Act.

Petitioner respectfully requests this Court to resolve the conflict among the Circuits and hold that a victim must customarily obtain supplies through interstate commerce before a diminution of that victim's resources can be held to have an effect on interstate commerce as required by the Hobbs Act.

CONCLUSION

The opinion of the United States Court of Appeals for the Tenth Circuit affirming the trial court's conviction of the Petitioner herein, erroneously ignores or expands this Court's prior holdings which require that a mailing, for purposes of Title 18, U.S.C. Sec. 1341, be sufficiently closely related to the alleged mail fraud.

The Second and Seventh Circuit Courts of Appeal have held that under the depletion of assets theory, a victim of an extortionate scheme must customarily obtain supplies through interstate commerce before a diminution of his resources will be held to have an effect on interstate commerce for purposes of the Hobbs Act. The Tenth Circuit Court of Appeals has apparently fashioned a standard that allows the Hobbs Act to be satisfied where the victim of an

extortionate scheme does any amount of business through interstate commerce. Petitioner contends that although the Hobbs Act is to be construed broadly, it is not limitless and call upon this Honorable Court to resolve the apparent conflicts among the Circuits and require the Circuits to adhere to the rule established by the Second and Seventh Circuits that a victim must customarily obtain supplies through interstate commerce before diminution of that victim's resources will be said to have an effect on interstate commerce. Thus, under the record in Petitioner's case, should that standard be adopted by this Court, the conviction on the extortion counts will have to be reversed.

For the reasons set forth herein above, the Petitioner requests that the Writ of Certiorari be granted.

Respectfully submitted,

GENE STIPE
Counsel of Record

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Attorneys for Petitioner

May, 1984

CERTIFICATE OF SERVICE

I, Gene Stipe, being a member of the Bar of this Court, do hereby certify that on the ..... day of May, I served true and correct copies of the above and foregoing Petition for Writ of Certiorari by depositing three (3) copies in the United States Mail, postage prepaid thereon, to each of the following:

Mr. Gary L. Richardson
United States Attorney
Federal Courthouse
Muskogee, Oklahoma

Mr. Rex E. Lee
Solicitor General
Tenth and Constitution Avenue
Washington, D.C. 20530

All parties required to be served have been served.

Gene Stipe

APPENDIX A

PUBLISH

[Filed Feb. 29, 1984]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee.	)	
v.	)	No. 82-2607
MARVIN JAMES, Defendant-Appellant.	)	

Appeal from the United States District Court
For the Eastern District of Oklahoma
(D. C. No. 82-66-CR)

Gene Stipe (Anthony M. Laizure with him on the brief) of Stipe, Gossett, Stipe, Harper, Estes, McCune & Parks, McAlester, Oklahoma, for Defendant-Appellant.

Gary L. Richardson, United States Attorney (Donn F. Baker, Assistant United States Attorney, with him on the brief), Muskogee, Oklahoma, for Plaintiff-Appellee.

Before McWILLIAMS and LOGAN, Circuit Judges, and COOK, District Judge.*

LOGAN, Circuit Judge.

Defendant Marvin James, a former county commissioner in McIntosh County, Oklahoma, appeals his convic-

*Honorable H. Dale Cook, Chief United States District Judge for the District of Oklahoma, sitting by designation.

tion on twenty-three counts of mail fraud, in violation of 18 U.S.C. § 1341, and three counts of extortion, in violation of 18 U.S.C. § 1951. Defendant asserts six grounds of error: (1) the trial court's voir dire of prospective jurors was inadequate in light of the massive pretrial publicity; (2) the trial court should have questioned each juror individually concerning exposure to pretrial publicity; (3) the mailing of county warrants to vendors did not constitute mail fraud; (4) insufficient evidence existed to show that defendant unlawfully interfered with interstate commerce; (5) the trial court gave an improper instruction on the government's burden of proving a nexus with interstate commerce; and (6) the court should have declared a mistrial because of prosecutorial misconduct. We affirm.

James' indictment resulted from a three-year investigation of corrupt practices of Oklahoma county commissioners. James was charged with devising a scheme to defraud the citizens of McIntosh County by depriving them of their right to have county business conducted free from corruption and undue influence. Specifically, James was convicted for receiving kickbacks in return for placing orders for road and bridge building materials and supplies with certain vendors. All of the issues raised on appeal except for the issue of prosecutorial misconduct have been considered by this Court in other cases involving Oklahoma county commissioners. Since there are no significant factual distinctions between those cases and this one, our disposition of all issues except that of prosecutorial misconduct is controlled by those cases.

I

James argues that the trial court conducted an inadequate voir dire because the vast majority of jurors had read or heard about the ongoing investigation of county commissioners. He asserts that the voir dire was not sufficiently broad to permit the trial court to assess the effect of this publicity on the jurors' impartiality and that each

juror should have been questioned individually out of the presence of the other jurors. Virtually identical contentions were made and rejected in *United States* v. *Whitt*, 718 F.2d 1484 (10th Cir. 1983), and *United States* v. *Primrose*, 718 F.2d 1484 (10th Cir. 1983). Based on our review of the record, which indicates that none of the jurors were exposed to pretrial publicity specifically mentioning James' name, and on the authorities and analysis set out in *Whitt*, we conclude that the voir dire was adequate.

II

James asserts that the government failed to show the mailings in this case were in furtherance of a scheme to defraud. He argues that because the bribe payments were before or after the purchases, he was not scheming to defraud at the time of the payments. He also asserts that because the county was compelled to mail warrants to pay for materials and supplies the mailings fall outside the scope of the mail fraud statute under *Parr* v. *United States*, 363 U.S. 370 (1960). We have already considered and rejected virtually identical arguments in similar factual contexts in *Primrose*, 718 F.2d at 1489-91, and *United States* v. *Gann*, 718 F.2d 1502, 1504 (10th Cir. 1983).

James contends that the evidence on the extortion counts failed to establish the effect on commerce required under the Hobbs Act, and that the trial court committed prejudicial error by instructing the jury that if "any supplies, materials, or equipment [were] purchased or obtained" from outside Oklahoma and brought into the state as a result of an extortionate transaction, then the government would have carried its burden of proof on nexus with interstate commerce. We dealt with similar contentions in *United States* v. *Boston*, 718 F.2d 1511 (10th Cir. 1983), and *Whitt*, 718 F.2d at 1500-01. On the basis of the authorities and analyses set out in those cases, we conclude that James' arguments are meritless.

III

Finally, James argues that the trial court erred in not granting a mistrial for prosecutorial misconduct. On cross-examination of McIntosh County Clerk Ian Warren, defense counsel asked if he knew of defendant's reputation in the community. Warren responded that James' reputation was excellent. On redirect examination the prosecutor asked, "Do you think if the people of McIntosh County as a whole knew if the evidence was, we'll say, or if it was determined that Marvin James has been taking kickbacks . . . that his reputation would be one for honesty and integrity in the community?" In *United States* v. *Polsinelli*, 649 F.2d 793, 795 (10th Cir. 1981), we held it was improper for the government to ask such questions because they are based on the assumption that the defendant is guilty of the crimes for which he is being tried. *See also United States* v. *Candelaria-Gonzalez*, 547 F.2d 291, 294-95 (5th Cir. 1977). In *Polsinelli* the same objectionable question was asked of two of defendant's character witnesses, and in *Candelaria-Gonzalez* four defense character witnesses were asked the same hypothetical question resting on the assumption of guilt. Here, the objectionable question was only posed to the government's first witness, who was not a reputation witness for the defendant. James subsequently put on nineteen character witnesses to vouch for his good reputation and the prosecution asked none of these witnesses a hypothetical question based on the assumption of guilt.

The second allegedly prejudicial question the government asked one of its witnesses was, "You knew Marvin James was on the take, didn't you"? Defendant asserts that this was an inappropriate reference to his character. *See United States* v. *Freeman*, 514 F.2d 1314, 1319 (D.C. Cir. 1975). In *Freeman* the prosecutor made reference in closing argument to the defendant's background which was suggestive of guilt. The court held that the references to defendant's background were irrelevant to the issues in the case and thus prejudicial and impermissible.

A third instance of alleged misconduct occurred during cross-examination of a defense witness, Clyde Parker. The prosecutor asked Parker if he knew of grand jury testimony to the effect that Parker had been taking kickbacks. We agree with defendant that this remark refers to facts outside the record and is therefore improper.

We have reviewed all of these questions in the context of the record. We note that the trial court sustained objections to all of the questions (in one instance itself making the objection "on behalf of the defense counsel"), directing the witness not to answer, and, with respect to the last two, instructing the jury to disregard the remarks. While we agree that at least two of the questions were improper they do not require reversal. In *Marks* v. *United States*, 260 F.2d 377, 383 (10th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959), this Court stated,

> "It is not all misconduct or improper argument that will require granting a new trial or a reversal on appeal. It is only when such conduct can present a question whether there is reason to believe that it influenced the jury's verdict that the failure to take appropriate steps to remove it will warrant a reversal."

There was abundant evidence of guilt in the record, and we believe the trial court's actions were sufficient to prevent prejudice in this case. *See Chapman* v. *California*, 386 U.S. 18 (1967).

AFFIRMED.

APPENDIX B

[Filed March 13, 1984]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
vs.	)	No. 82-2607
MARVIN JAMES, Defendant-Appellant.	)	

PETITION FOR REHEARING

COMES NOW the Appellant, and Petitions this Court for a Rehearing. In support of his Petition for Rehearing, Appellant would point out to the Court that it has apparently overlooked or misconstrued certain arguments raised by Appellant in his Appeal.

Concerning the examination of prospective Jurors, this Court held that the Voir Dire conducted by the Trial Court to test the Jurors' impartiality was not an abuse of discretion and that the nature of the publicity in the County Commissioner cases did not mandate greater care than was taken so as to insure impartiality. The Court seemed to place emphasis on the fact that none of the articles explicity dealt with the Appellant alone, and thus distinguish this case from the *Silverthorne* case cited by Appellant in his Brief.

Appellant contends that it was not necessary for the Pre-Trial publicity to be focused on him alone. The thrust and gist of the Pre-Trial publicity as evidenced by the newspaper articles made part of the record was that there was massive and widespread corruption among County Commissioners and suppliers in the State of Oklahoma. In fact, the scientific survey submitted into the record by the Appellant, indicated that over ninety-four (94) per cent

of the people in the State of Oklahoma were aware of the Federal investigation into County Commissioner kickbacks and that over sixty-two (62) per cent of the people of the State of Oklahoma felt that there was widespread corruption among County Commissioners. This information alone should have put the Trial Court on notice that there would be people on the prospective Jury Panel with pre-formed opinions. Yet the Trial Court failed to conduct a very searching Voir Dire to discover whether there were any persons on the Panel with pre-formed opinions. The Trial Court, as does this Court, concluded that the Voir Dire was sufficient because each Juror assured the Court that they could be fair and impartial.

The Court has thus overlooked the thrust of the holding in the recent case of *United States* v. *Blanton,* 700 F.2d 298 (6th Cir. 1983). The *Blanton* case was incorporated into all the County Commissioner briefs and arguments by way of subsequent letter to this Court. The Sixth Circuit concluded from a survey of cases from nearly every Circuit that perhaps not so much deference should be given to a Juror's assessment of his own impartiality. The *Blanton* case involved a public figure and substantial Pre-Trial publicity, as does the instant case. As in the instant case, the Trial Court in *Blanton* failed to inquire into the nature and extent of the Jurors' exposure to Pre-Trial publicity. The Court found that the Voir Dire conducted by the Trial Court was not sufficient to determine the percentage of the veniremen who had a preconceived opinion and was further insufficient to determine the strength of the opinions, despite the assurances by the Jurors that they could be fair and impartial.

Appellant contends that the assurances of a Juror that he can be fair and impartial should not be afforded much deference in cases of substantial Pre-Trial publicity. That at a minimum, a Trial Court should at least inquire into the extent and sources of a Juror's exposure to Pre-Trial publicity. Only then will Counsel for Defendants be able

to adequately assess a Juror's impartiality, and then intelligently exercise pre-emptory challenges and challenges for cause.

Appellant contends that his case was a proper one for a more searching Voir Dire. He was a County Commissioner in the State of Oklahoma at the time of Trial. There had been widespread and massive publicity about the Federal investigation into the so called kickback scandal involving County Commissioners in the State of Oklahoma. Evidence was introduced through Pre-Trial Motions that a majority of the people in the State of Oklahoma thought there was widespread corruption among County Commissioners. The fact that the Appellant was not named specifically in these articles should not be determinative of this issue, for the reasons heretofore cited.

WHEREFORE, the Appellant respectfully requests this Court to grant a Rehearing on the issue of adequacy of the Trial Court's Voir Dires so that he may further advance the arguments cited in this Petition for Rehearing.

Appellant further contends that this Court has misconstrued the Supreme Court's holding in the *Parr* case. The Court distinguishes *Parr* from the instant case apparently because the persons who did the mailing in *Parr* were not participants in the scheme. The Court states that the Appellant's reliance on *Parr* is misplaced because it rests on his view of the vendors as outsiders rather than as participants in the scheme. The Court states that if the scheme is properly viewed as including the vendor's receipt of County business as well as the Appellant's receipt of kickbacks, then the analogy to *Parr* breaks down, yet the Court fails to state why this is so.

Appellant contends that the *Parr* case is applicable to the instant case for the reason that the mailings in each instance are only incidental or collateral to the scheme, and not for purposes of executing the alleged scheme. The offenses involved in *Parr* and the instant case are of the

type that should be dealt with by appropriate State law. They involve local officials misappropriating local funds. The mails are not used to further the scheme to defraud nor are they used to delay the detection of the scheme to defraud. The fraud is executed when the County Commissioner and the vendor meet and agree that a kickback should be paid. That meeting of the minds is the gist of the offense. How that fraud is achieved or carried out is only a collateral matter. This type of scheme is unlike the typical mail fraud scheme wherein the mails are used to initiate or execute the fraud itself. In this case, the fraud is executed without the use of the mails. The mailing of the County Warrants or Invoices had no real affect on this scheme for the reason that the scheme could have just as easily taken place if the warrants and invoices had been picked up by the supplier as they were in many instances.

In conclusion, the Appellant contends this Court has broadened the mail fraud statute beyond the scope intended by Congress. It has turned what is essentially a State or Local offense into a Federal crime. The Supreme Court has addressed a case similar to the one at bar and has held that the mailings in question were not sufficient to invoke the mail fraud statute.

Appellant respectfully requests this Court to reconsider its holding in this case and reverse the mail fraud convictions.

Appellant finally contends that the Court erred in upholding the conviction on the Hobbs Act counts. The Appellant contends that not even a de minimis effect on Interstate Commerce was shown and consequently Federal Jurisdiction was not properly invoked on those counts. Appellants contends that before a conviction can be upheld on the theory of depletion of assets, that it must be shown that the victim customarily or regularly obtained goods through Interstate Commerce. This was not done in the instant case. The evidence concerning dealings in Inter-

state Commerce is virtually nonexistent. Some vendors testified they purchased some goods from out of State. However, this is not the type of substantial evidence which is required to sustain a finding that there was even a de minimis effect on Interstate Commerce. The Court seems to place the burden on the Appellant to show that the vendors and the County were not regularly or customarily engaged in purchasing items in Interstate Commerce. Appellant contends that it is the burden of the Government to show that either the County or the vendors were involved in the purchase of goods in Interstate Commerce on a regular basis. Since the evidence in this case did not support such a finding, Appellant contends that the convictions on the Hobbs Act must be reversed.

Lastly, Appellant contends there was reversible error based on the misconduct of the prosecuting attorney. The standard for determining whether such misconduct warrants reversal is set out in *Chapman* v. *California*, 386 U. S. 18 (1967), where the Supreme Court held that a Court must be able to conclude beyond a reasonable doubt that the error was harmless.

The most compelling reason for concluding this was not harmless error is that the Appellant was charged with forty-three (43) Counts, yet he was acquitted on seventeen (17) of those Counts. The evidence adduced by the government was substantially the same for all counts. Appellant contends there must have been some additional factor which persuaded the jury to convict him on others when the evidence was virtually the same. Appellant contends that factor was the prosecutorial misconduct of the prosecutor.

WHEREFORE, the Appellant respectfully requests this Court to grant his Petition for Rehearing and to hold further argument in this case or in the alternative to reverse the convictions on all counts for the above cited reasons and if necessary, to remand this case to the District Court for further proceedings.

[APPENDIX]

Respectfully submitted,

MARVIN JAMES,
Defendant-Appellant.

STIPE, GOSSETT, STIPE, HARPER,
ESTES, McCUNE AND PARKS

(s) *Gene Stipe*

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH TERM — March 26, 1984

Before Honorable Robert H. McWilliams, Honorable James K. Logan, Circuit Judges, and Honorable H. Dale Cook*

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	No. 82-2607
	)	
MARVIN JAMES,	)	
Defendant-Appellant.	)	

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, appellant's petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk

*United States District Judge for the District of Oklahoma, sitting by Designation.